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IN THE
COURT OF APPEALS OF INDIANA

DWAYNE ALAN PORTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A05-0603-CR-138
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE VIGO SUPERIOR COURT I
The Honorable Michael H. Eldred, Judge
Cause No. 84D01-0504-FB-0907

May 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Following a jury trial, Appellant-Defendant, Dwayne Porter, appeals his conviction and sentence for Unlawful Possession of a Firearm by a Serious Violent Felon as a Class B felony,[1] for which he received an enhanced sentence of fifteen years executed in the Department of Correction. Upon appeal, Porter challenges the sufficiency of the evidence to support his conviction and claims the trial court abused its discretion by sentencing him to an enhanced sentence.

We affirm Porter's conviction but reverse his sentence and remand to the trial court with instructions to impose a twelve-and-one-half-year executed sentence.

The record reveals that on April 1, 2005, Cody Tidd was driving a 2001 Silverado down Gannon Road in West Terre Haute when he observed Ryan Compton walking on the shoulder of the road. Tidd pulled up approximately fifteen to twenty feet behind Compton, spinning his tires, which caused Compton to stop, turn around, and approach Tidd. Tidd and Compton then started talking when, according to Tidd, a woman walked out onto the porch of her nearby trailer and started screaming at them. According to Tidd, the woman then fired four to six gunshots into the air with a pistol. Tidd testified that a man came from behind the trailer and toward him and Compton, also screaming at them. Tidd and Compton then went to Compton's house approximately forty yards away. According to Tidd, the same man who had come out from behind the trailer drove to Compton's house and began screaming at Compton's father. Tidd testified that Compton's mother called police, who subsequently arrived at the scene.

[1] Ind. Code § 35-47-4-5 (Burns Code Ed. Repl. 2004).

Compton similarly testified that after Tidd drove up behind him, honking his horn and squealing his tires, he too heard gunshots, approximately six to eight of them, and observed that they were coming from the vicinity of the trailer. Compton testified that he could not determine who was firing the gun.

Jessica Bellue, a passenger in the Silverado, testified that she heard approximately seven or eight gunshots and that the gunshots had two different sounds. Bellue further testified to seeing a woman come out of the trailer and that she ultimately observed a male in front of the trailer as well. Bellue further testified that the man she had observed at the trailer came to Compton's house in a truck and that he and Compton's dad "had a few words." Tr. at 60.

Shawna Allen, another passenger in the Silverado, testified that after the Silverado had come up behind Compton squealing its tires, she also heard multiple gunshots and a male voice screaming obscenities at them. Allen testified that she saw gunfire consistent with having come from a small pistol. According to Allen, there were about eight to twelve gunshots, which sounded like they came from more than one gun.

Helen Ray, a neighbor, testified that she was sitting at her computer when she heard the gunfire. Helen stepped outside her home and observed Porter's wife, Jamie, standing by the side of the road looking upset. When asked about the gunshots, Jamie reportedly alluded to a need to protect her property. Helen then observed Porter drive by her in his truck. According to Helen, sheriff's deputies then arrived. Helen testified that the next day she observed people, including someone she recognized as Porter's father, removing things from the trailer.

Helen's husband, Thomas Ray, testified that sometime after midnight on April 2, he observed individuals carrying out what appeared to be a long gun from Porter's trailer. According to Ray, the individual carrying what appeared to be the gun stepped close enough to a street light so that he could see the end of the barrel sticking out approximately three to four inches from a cloth covering it. Thomas further testified that people went into and out of the trailer the following day all day long.

Deputy Derrick Fell and Sergeant Brian DeHart of the Vigo County Sheriff's Department testified that they responded to reports of shots being fired at 965 Gannon Road. Upon questioning Porter whether he had fired a weapon, Porter answered that he had fired "one warning shot." Tr. at 136. Porter subsequently stated he had fired a gun "two or three times." Tr. at 138. Both Porter and his wife were then placed under arrest, and the two were transported to the Vigo County Jail.

Deputy Jeffrey Bell testified that on April 1, at 11:00 p.m. on the day Porter was arrested, Porter made a phone call from the jail in which he stated that he had shot a shotgun into the air from behind the trailer, and that he had had his parents remove a handgun from the trailer. During that call, Porter also stated he still had two shotguns inside the trailer and indicated where the guns were located for purposes of having them removed. Deputy Bell also testified that Porter made another phone call on April 2 at 3:42 p.m. in which he again referenced his firing a shotgun the day before. Again, on April 4, Porter made another phone call from the jail in which he arranged for the removal of "B's" located in a green and white box with the number "40" on it. Tr. at

213. Porter made additional calls that day in which he agreed to sell his two shotguns for purposes of raising money for bail.

Deputy Bell also testified that he conducted a search of the Porters' trailer on April 4, 2005. He did not find any firearms in the residence but did find three .40 caliber handgun bullets, a gun rack, and a spent shotgun shell casing.

Porter testified that his wife had fired a handgun, but he had not fired any guns. Porter further testified that he had made statements to police that he had fired a gun in order to protect his wife. According to Porter, the handgun was his wife's, and the shotguns at the trailer were dropped off as a birthday present from his grandfather a few days earlier, but that he had never seen them there. Porter testified that he never had his hands on or fired a gun on the evening in question, and that his only purpose in arranging for their disposal was to get his wife out of jail.

Porter was charged on April 7, 2005 with possession of a firearm[2] by a serious violent felon as a Class B felony. The case proceeded to a bifurcated trial on December 13-14, 2005. Following the jury's finding of guilt and Porter's stipulation to his prior conviction, the trial court entered judgment of conviction and sentenced Porter on February 13, 2006 to fifteen years executed in the Department of Correction. Porter filed his notice of appeal on March 13, 2006.

Upon appeal, Porter first claims that there was insufficient evidence to convict him of unlawful possession of a firearm by a serious violent felon. In making this argument, Porter claims that the State failed to establish a corpus delicti.

[2] Porter was specifically charged with possession of a shotgun.

The State first responds by claiming that Porter failed to raise this issue at trial and therefore has waived its appellate review. We prefer to address this claim on the merits. See Clark v. State, 512 N.E.2d 223, 227 (Ind. Ct. App. 1987) (determining that although the State's objection to appellate consideration of corpus delicti claim when no objection was made at trial had "some merit," the issue would nevertheless be considered on the merits).

As explained by our Supreme Court in Sweeney v. State, 704 N.E.2d 86, 111 (Ind. 1998), cert. denied, 527 U.S. 1035 (1999), crime may not be proved solely on the basis of a confession. See also Williams v. State, 837 N.E.2d 615, 617 (Ind. Ct. App. 2005), trans. denied. There must be some other proof of the crime in order to prevent convictions upon confessions to crimes which never occurred. Id. In Indiana, to support the introduction of a defendant's confession into evidence, the corpus delicti of the crime must be established by independent evidence that an individual committed a criminal offense. Clark, 512 N.E.2d at 227. The independent evidence need not be shown beyond a reasonable doubt; rather, the evidence need only provide an inference that a crime was committed. Williams, 837 N.E.2d at 617-18. Such inference may be established through circumstantial evidence. Id. at 618.

Based upon the totality of the evidence, we conclude there was evidence independent of Porter's confessions establishing the corpus delicti of his possession of a shotgun. See Warthan v. State, 440 N.E.2d 657 (Ind. 1982). Witness testimony indicated that both Porter and his wife were visibly angry with the occupants of the Silverado, that Porter's wife fired shots into the air with a handgun only, that there was the sound of

more than one type of gunshot, that Porter subsequently appeared near the trailer, that Porter was so angry he drove over to the Compton house, that a long gun was subsequently seen being removed from Porter's trailer after he had been taken to jail, and that a spent shotgun shell was subsequently found inside the trailer, as was a gun rack. Given the above evidence, a reasonable inference could be made that Porter had been in possession of a shotgun. We therefore find evidence of corroboration sufficient to establish the corpus delicti independent of Porter's oral admissions.

In further considering the sufficiency of the evidence to support Porter's conviction, we observe that we will neither reweigh evidence nor judge witness credibility, but instead, considering only the evidence which supports the conviction along with the reasonable inferences to be drawn therefrom, we determine whether there is substantial evidence of probative value from which a reasonable jury could have concluded that the defendant was guilty of the charged crime beyond a reasonable doubt. Kien v. State, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), trans. denied.

Porter was convicted of possession of a firearm by a serious violent felon, which provides, "A serious violent felon who knowingly or intentionally possesses a firearm commits unlawful possession of a firearm by a serious violent felon, a Class B felony." See I.C. § 35-47-4-5. We note that Porter does not dispute his status as a serious violent felon, so we need only consider the sufficiency of the evidence to establish possession. Possession of a firearm may be either actual or constructive. Tate v. State, 835 N.E.2d 499, 511 (Ind. Ct. App. 2005), trans. denied. A person who has direct and physical

control over a firearm has actual possession, whereas a person who has the intent and capability to maintain control over a firearm has constructive possession. Id.

Here we have noted that the evidence, which includes testimony that different-sounding shots were fired, that Porter was angry and on the scene, that a long gun was observed being carried out of Porter's trailer, and that an empty shotgun shell and gun rack were inside the trailer, supports an inference of Porter's possession of a shotgun. This evidence, together with Porter's own admissions in his telephone conversations that he possessed and shot a shotgun, are sufficient evidence to support his conviction of possession of a firearm.[3] We therefore find Porter's challenge to the sufficiency of the evidence to support his conviction for possession of a firearm as a serious violent felon to be without merit.[4]

Porter's final challenge upon appeal is to his sentence. Porter challenges the trial court's sentence by first contesting its consideration and weighing of aggravators and mitigators. We bear in mind that sentencing determinations, including whether to adjust the presumptive[5] sentence, are within the discretion of the trial court. Ruiz v. State, 818

[3] A "firearm" is defined as "any weapon that is capable of or designed to or that may readily be converted to expel a projectile by means of an explosion." Ind. Code § 35-47-1-5 (Burns Code Ed. Repl. 2004).

[4] As part of his challenge to the sufficiency of the evidence, Porter relies upon Harmon v. State, 849 N.E.2d 726, 730-31 (Ind. Ct. App. 2006) as authority for claiming that self-defense is legal justification for the charge of possession of a firearm by a serious violent felon. Porter did not present a claim of self-defense at trial, however, so we find this argument to be without merit.

[5] The amended version of Indiana Code § 35-50-2-5 (Burns Code Ed. Supp. 2006) references the "advisory" sentence, reflecting the April 25, 2005 changes made to the Indiana sentencing statutes in response to Blakely v. Washington, 542 U.S. 296 (2004). Since Porter committed the crime in question on April 1, 2005, before the effective date of the amendments, we apply the version of the statute then in

N.E.2d 927, 928 (Ind. 2004). If a trial court relies upon aggravating or mitigating circumstances, it must do the following: (1) identify all significant aggravating or mitigating circumstances; (2) explain why each circumstance is aggravating or mitigating; and (3) articulate the evaluation and balancing of the circumstances. Id.

When a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are mitigating, and the trial court is not required to explain why it does not find the proffered factors to be mitigating. Stout v. State, 834 N.E.2d 707, 710 (Ind. Ct. App. 2005), trans. denied. The trial court is not required to give the same weight as the defendant does to mitigating evidence. Fugate v. State, 608 N.E.2d 1370, 1374 (Ind. 1993). A single aggravating circumstance may be sufficient to justify an enhanced sentence. McNew v. State, 822 N.E.2d 1078, 1082 (Ind. Ct. App. 2005). An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Matshazi v. State, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), trans. denied. Further, a trial court is not required to include within the record a statement that it considered all proffered mitigating circumstances, only those that it considered significant. Id.

Upon sentencing Porter, the trial court made the following statement:

> "Show that by his own admission of the Adult Probation Department and the inclusion of the Adult Probation Department report that he does have a history of criminal conduct that includes two periods of incarceration both

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effect and refer instead to the presumptive sentence. See Ind. Code § 35-50-2-5 (Burns Code Ed. Repl. 2004).

> involving a handgun, one involving the shooting of a person, so that there is most definitely by law is the existence of that aggravating circumstance[]. I don't find any real mitigating circumstances here, his son, that is unfortunate, perhaps that is a slight mitigator, but this finally having learned his lesson is pretty hard to swallow given the facts of this situation and the fact that after two periods of incarceration, here he is again a third time with a handgun [sic], I don't know what the facts are about the Vermillion County situation, so, why the sentence was what it was there, I don't know. I only know this. That given this record and given the situation of the third time with a handgun [sic], a deadly weapon, that a sentence of the maximum of twenty years would easily be justifiable here. Now, I am going to take into consideration the fact that from what I can tell the gunshots were in the air, although that doesn't make them not dangerous, but it was not a third time of shooting at someone, it was reckless behavior, but it would be entirely different, that to me would mean that the maximum sentence would not be justified, but apart from that I must feel that the State's argument has logic in this case, and therefore, Dwayne Porter, I sentence you to the determinate period of imprisonment of ten (10) years in the Indiana Department of Correction and because of the aggravated circumstances I have just described, I enhance that by five (5) years for a total executed sentence of fifteen (15) years. Show that I am recommending that he receive anger management and substance abuse treatment as appropriate in the Department of Correction." Sentencing Tr. at 17-19.

Porter argues that the trial court's finding and weighing of aggravators and mitigators was erroneous by first claiming that the court's finding him in possession, for a third time, of a handgun, was an erroneous finding. While we agree that Porter was found in possession of a shotgun in the instant case, not a handgun, the court's emphasis was more on the fact that Porter was again in possession of "a deadly weapon." Sentencing Tr. at 18. On this point, therefore, we conclude that the court's consideration of aggravators and mitigators was not compromised by its consideration of Porter's possession of the deadly weapon of a handgun when in fact he was in possession of the deadly weapon of a shotgun.

Porter also claims error on the part of the trial court for failing to find mitigators. Contrary to Porter's claim, however, the trial court did find as a slight mitigator the fact that he had a child. We would further remind Porter that, as stated above, an allegation that the trial court failed to identify or find a mitigating factor requires a showing that the mitigating evidence is both significant and clearly supported by the record, which Porter has failed to do. See Matshazi, 804 N.E.2d at 1239. We find no error in the court's consideration of mitigators.

Porter further challenges the court's consideration of aggravators by claiming that the trial court erroneously considered one of his past convictions, which was an element of the crime of the instant conviction, as a separate aggravator. Porter is correct that a trial court may not use a material element of the offense as an aggravator. Lemos v. State, 746 N.E.2d 972, 975 (Ind. 2001). Here, Porter was convicted of being in possession of a firearm as a serious violent felon. His prior felony used to establish his status as a serious violent felon was a prior battery conviction in Vermillion Circuit Court. In pronouncing Porter's aggravated sentence, the court placed particular weight upon Porter's criminal history involving two prior firearms convictions, and specific weight upon the fact that in one of those prior convictions, the Vermillion County case, an individual had been shot. Because this prior conviction had already been factored into the elements of the crime in the instant case, it was not proper for the trial court to give additional aggravating weight to this prior conviction. Porter's additional adult criminal history includes a 1993 conviction for trespass, a 1994 conviction for theft, and 1998 convictions, all under one cause number, for possession of marijuana, criminal

recklessness as a Class D felony, and carrying a handgun without a license. Porter admitted that his criminal recklessness conviction involved a handgun.[6] In light of Porter's criminal history and his continuing irresponsible use of a firearm, we conclude the trial court was justified in according Porter's criminal history aggravating weight and in finding such weight outweighed the "slight" mitigating weight of hardship to his son. However, because the trial court, in attributing aggravating weight to Porter's criminal history, paid particular attention to the 1995 battery conviction used to establish the instant offense, which it was not allowed to do, we conclude the aggravator of criminal history does not support the five-year enhancement. We therefore reduce Porter's sentence to twelve and one-half years executed in the Department of Correction, which represents the ten-year presumptive sentence and a two-and-one-half-year enhancement based upon Porter's criminal history.[7]

Having found sufficient evidence of Porter's conviction and having revised his fifteen-year sentence to a twelve-and-one-half-year sentence, we affirm Porter's conviction and reverse and remand this cause to the trial court with instructions to revise Porter's sentence in accordance with this opinion. We further instruct the trial court to

[6] Contrary to the State's claim, it was the 1995 battery conviction used in the instant offense to establish Porter was a serious violent felon which involved the shooting of another person, not the 1998 criminal recklessness conviction.

[7] While Porter, in his brief, reminds this court of our authority under Indiana Appellate Rule 7(B) to revise sentences which we determine to be inappropriate in light of the nature of the offense and the character of the offender, he does not develop this claim through relevant facts or cognizable reasoning. We therefore deem this argument waived. See Ind. App. R. 46(A)(8)(a). In any event, in light of Porter's criminal history and his historically dangerous and continuing use of firearms, including for purposes of threatening young people as in the instant case, we are not struck that his twelve-and-one-half-year sentence is noticeably inappropriate.

send a corrected abstract of judgment to the Department of Correction reflecting such sentence revision.

The judgment of the trial court is affirmed in part, reversed in part, and remanded.

CRONE, J., concurs.

SHARPNACK, J., concurs in part and dissents in part with opinion.

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DWAYNE ALAN PORTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A05-0603-CR-138
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

SHARPNACK, Judge, dissenting in part

I concur in the decision of the majority except as to the reduction of the sentence. I would affirm the fifteen-year sentence.